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No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF CINEMARK USA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Cinemark USA, Inc. submits this brief as *amicus curiae* in support of Petitioners Regal Cinemas, Inc. and Eastgate Theatre, Inc. (collectively "Regal").[2] Cinemark's interest in this matter derives from its status as a builder and operator of places of public accommodation, and as a litigant in related cases in which the United States Department of Justice participated successively as *amicus curiae*, defendant, and plaintiff.[3] The cases of *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), *United States v. Cinemark USA, Inc.*, No. 02-3100, 2003 WL 22508500 (6th Cir. Nov. 6, 2003), and *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), comprise the present federal circuit conflict concerning interpretation of federal construction standards relating to wheelchair seating locations in small assembly areas.[4] The intervening case of *Cinemark USA, Inc. v. United States Department of Justice*,

1. Counsel for *amicus curiae* discloses that this brief was authored by Laura M. Franze and M. Brett Burns. Ms. Franze has been *amicus curiae's* counsel of record throughout all stages of the *Lara v. Cinemark USA, Inc.*, *Cinemark USA, Inc. v. United States Department of Justice*, and *United States v. Cinemark USA, Inc.* cases. *Amicus curiae* also discloses that Ms. Franze and Mr. Burns represent Petitioner Regal Cinemas, Inc., a wholly unrelated corporate entity, in the underlying petition for writ of certiorari, and served as its counsel of record in the courts below. Counsel for *amicus curiae* certifies that no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. This disclosure is made pursuant to Supreme Court Rule 37.6.

2. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus curiae* certifies that all parties have consented to the filing of this brief, and consent letters evidencing the parties' agreement have been filed with the Court.

3. Cinemark, like Regal, is a motion picture exhibitor. Cinemark operates 2,237 movie screens in 33 states.

4. These cases also highlight and exacerbate conflict and confusion in the circuits on judicial deference standards to agency interpretations of regulations, and due process implications of retroactive remedies where interpretations create new obligations, as discussed in Section B of this Brief, *infra*.

No. 3:99 CV 0183M, 2000 WL 915091 (N.D. Tex. July 6, 2000), concerns Cinemark's attempts to seek review under the Administrative Procedure Act of the DOJ's "rulemaking through litigation" strategy against the movie theater industry.

As a Texas-based company, Cinemark can provide the Court with detailed information concerning the DOJ's certification of the Texas Accessibility Standards as "meeting or exceeding federal accessibility standards" under the DOJ's state-code certification program, as well as the DOJ's public pronouncements that building in reliance on state accessibility approvals issued under DOJ-certified codes (such as the Texas Accessibility Standards) would "ensure that . . . the requirements of the ADA [were met]," "allow builders to be assured of compliance through inspections early in the construction process," and provide builders with "additional legal protection in ADA lawsuits." App. 1a-2a.[5]

Cinemark's plans to build and acquire additional movie theaters also give rise to an interest in the legal issues presented by Regal. The current uncertainty as to what construction designs are lawful chills those plans. Moreover, Cinemark has a substantial interest in avoiding punitive retrofitting costs for movie theaters that, to the knowledge of Cinemark, as well as the numerous state inspectors who issued accessibility approvals to Cinemark under the DOJ's own state code certification program, were built in full compliance with all applicable legal standards. Cinemark's interactions with the DOJ, including the

5. As explained below, TAS was certified by the DOJ as "meeting or exceeding" federal accessibility standards on September 23, 1996, and publicly promoted by the DOJ as a mechanism upon which builders could rely to construct public accommodations lawfully. App. 3a. Cinemark relied upon these state and local approvals of its compliance with TAS, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building stadium-style movie theaters in Texas and across the United States. Cinemark's first stadium-style theaters were constructed in Texas, and more Cinemark movie theaters are located in Texas than in any other state. *See infra*.

agency's consistent resistance to discovery concerning the basis for its rulemaking, as well as its concerted efforts to avoid judicial review under the APA, also provide important background information relating to the issues presented in Regal's Petition.

PRELIMINARY FACTUAL BACKGROUND

The collective experiences of Cinemark and Regal with the DOJ illustrate how a government agency has imposed new substantive legal obligations on an industry without regard to due process of law. By claiming application of judicial deference doctrines to after-the-fact "interpretations" and "reinterpretations" of a federal construction regulation in litigation, the DOJ has effectively bound the public, while itself remaining free to continue to "reinterpret" the law again. Moreover, by cynically asserting inconsistent legal positions in parallel lawsuits, the agency has avoided any inquiry into how, when, at what agency level, and on what factual basis its new rule was developed.

Between 1995 and 1999, Cinemark, along with other movie theater companies, responded to the market demand for stadium-style movie theaters by building more than 70 stadium-style movie theater multiplexes across the nation. Twenty-five multiplexes were constructed in Cinemark's home state of Texas, where public accommodations are subject to both federal accessibility requirements under Title III of the ADA and the ADAAG, as well as state accessibility requirements under the DOJ-certified TAS.[6] At the time of certification, the DOJ publicly encouraged all builders in the State of Texas to rely upon state and local approvals of their compliance with TAS

6. TAS closely follows the ADAAG and contains, among other things, a "Section 4.33.3" entitled "Placement of Wheelchair Locations" that is modeled after ADAAG predecessor American National Standards Institute ("ANSI") guidelines, and which uses the same term "lines of sight comparable" found in ADAAG. Section 4.33.3 of ADAAG is also entitled "Placement of Wheelchair Locations." *Compare* ADAAG § 4.33.3 (requiring "lines of sight comparable to those for members of the general public") *with* TAS § 4.33.3 (requiring "lines of sight comparable to those for other members of the audience").

and other DOJ-approved codes, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building public facilities. On its website, the DOJ described the importance of certification as follows:

> Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act. . . . "*Everyone in the State of Texas — builders, architects, business owners, and the general public — will benefit from Texas's new accessibility standards*" . . . . "*Certification makes it easy to comply with the law.*" . . . Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

App. 1a. In "Certification of State and Local Building Codes," another publication from the DOJ's website, the DOJ stated as follows:

> Code certification facilitates voluntary compliance [with Title III of the ADA] by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a

> significant role in enforcing the substance of the ADA.

App. 2a. Cinemark relied upon these DOJ representations, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building stadium-style movie theaters in Texas and across the United States.

On or about February of 1998, the DOJ informed Cinemark that it planned to investigate Cinemark's compliance with the "lines of sight comparable" clause contained in Section 4.33.3 of ADAAG. Prior to this time, the DOJ had consistently taken the position that wheelchair locations could be situated anywhere within the footprint of small venues (with 300 or fewer seats) where dispersal of seating was not required, and had never even intimated that a "viewing angle" requirement existed concerning wheelchair seating locations. App. 4a-6a.[7] Perplexed Cinemark officials immediately requested a meeting to discuss the DOJ's concerns. In response to specific requests for assistance regarding both existing theaters and prospective construction, DOJ representatives conceded that the agency had taken no position on the issue of whether Section 4.33.3 required consideration of "viewing angles," required wheelchair seating locations to be placed a specified distance from the movie screen,

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7. Until this time, all DOJ pronouncements concerning "lines of sight" focused solely on proving unobstructed views. *See Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 736-37 (3d Cir. 1999) (Section 4.33.3 did not address issue of lines of sight over standing spectator, and DOJ's interpretation requiring unobstructed lines of sight over standing spectators, as set forth in Technical Assistance Manual, not entitled to deference); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) ("We think the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without any obstruction."); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (Section 4.33.3 "does not purport to decide whether lines of sight over standing spectators are — or are not — necessary in order to comply with the ADA").

or even required particular "sight lines" in movie theaters with less than 300 seats where dispersal of wheelchair seating locations was not required. App. 4a-6a.

Despite these representations, in July of 1998, after the close of discovery and on the eve of summary judgment deadlines, the DOJ moved for leave to appear as *amicus curiae* in a private plaintiff lawsuit styled *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.), and asserted that it "interpreted" Section 4.33.3 of ADAAG to require compliance with a "viewing angle" requirement, even in small venues. The DOJ defined this requirement as requiring wheelchair seating locations in stadium-style movie theaters to provide lines of sight within the "range" of viewing angles offered to "most" of the general public, adjusted for tilt, from tiered stadium-style seats, and further opined that any viewing angle in excess of thirty-five degrees would exceed a quantitative anthropomorphic "discomfort threshold." App. 7a-9a. The DOJ also asserted that the district court should defer to the agency's interpretation. The DOJ did not refer to any earlier manifestation of this interpretation and later conceded that no prior interpretation existed. App. 22a; *see also United States v. Cinemark*, 2003 WL 22508500, at *11 (documenting the DOJ's concession at oral argument that the earliest date that theater designers, owners, and builders were informed that "lines of sight" included "viewing angles" was in the DOJ's July 1998 *Lara* brief).

Cinemark immediately attempted to discover the basis for the DOJ's abrupt change of position. The DOJ successfully opposed Cinemark's attempt to depose an agency representative, to join the DOJ as a party, to assert claims against the DOJ under the APA challenging the legality of the purported interpretation, and to conduct other discovery concerning the basis for the purported interpretation, all on the grounds that deadlines for joinder and discovery had expired. The DOJ represented to the El Paso district court, however, that Cinemark was "free to assert its counterclaim (asserting a violation of the

Administrative Procedure Act) in a new action" against the government. App. 10a-11a.[8]

Cinemark soon thereafter filed a "new action" in Dallas, Texas seeking review of the DOJ's purported *Lara* interpretation. In a case styled *Cinemark USA, Inc. v. United States Department of Justice*, No. 3:99 CV 0183M (N.D. Tex.), Cinemark asserted that the DOJ's interpretation was a *de facto* legislative rule, improperly promulgated without notice and comment under the APA. The DOJ again resisted any discovery, objecting on the basis of deliberative process privilege. The DOJ again argued in a motion to dismiss that Cinemark's APA claim was not ripe for review because the agency's interpretation did not rise to the level of "'final agency action' subject to judicial review under the Administrative Procedure Act." App. 12a. A federal magistrate judge initially denied DOJ's motion to dismiss (App. 13a-14a), but the district court sustained the DOJ's objections and ruled in favor of the government, upholding the DOJ's contention that its interpretation was not "final agency action," and therefore dismissed the lawsuit for lack of jurisdiction. *Cinemark USA, Inc. v. United States Dep't of Justice*, 2000 WL 915091, at *3.

At the same time that the DOJ was asserting deliberative privilege and arguing that its interpretation did not constitute "final agency action," was not the considered judgment of the agency, was not binding, and lacked "force of law," the DOJ was preparing to file a nationwide enforcement action against

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8. The DOJ quashed deposition discovery focused on the factual basis of its new interpretation by filing a miscellaneous action in Washington, D.C. and arguing that "examination of this sort is not allowed, particularly when the government is not a party and the action does not challenge rulemaking." App. 15a-16a. When Cinemark subsequently articulated express APA claims "challenging rulemaking" against the DOJ in the Dallas and Cleveland lawsuits, the DOJ opposed discovery on deliberative privilege and work product grounds.

Cinemark based on the same core litigation position that the DOJ had first asserted in *Lara*. In March of 1999, after a year-long investigation that focused exclusively on Cinemark's Texas theaters, including on-site inspections limited to Cinemark's Texas theaters, the DOJ filed suit against Cinemark in the Northern District of Ohio, thereby requiring Cinemark to defend a national pattern and practice lawsuit in a jurisdiction and state hand-picked by the DOJ.[9] After Cinemark's motion to dismiss or transfer to a Texas court was denied, Cinemark pleaded counterclaims and again asserted that the DOJ was guilty of *de facto* legislative rulemaking in violation of the APA. Once again, the DOJ successfully secured dismissal of Cinemark's APA claims on grounds of "no final agency action." *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11 (N.D. Ohio March 22, 2000) (*reproduced in* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at App. 75a-76a, filed previously with the Court). Once again, the DOJ opposed discovery on deliberative privilege and ripeness grounds. App. 17a-19a. To date, despite repeated attempts, neither Cinemark nor any other movie theater company has been able to conduct discovery on or secure judicial review of any of the various DOJ interpretations of Section 4.33.3 of ADAAG.

Moreover, despite prevailing against the DOJ and private plaintiffs in the Fifth Circuit's *Lara* decision in April of 2000, where the Fifth Circuit ruled in favor of Cinemark and expressly rejected the DOJ's interpretation of Section 4.33.3 of ADAAG, Cinemark was forced to defend itself again against DOJ claims in Cleveland, this time based on another interpretation of Section 4.33.3. In December of 2000, Cinemark moved for summary judgment in the *United States v. Cinemark* lawsuit, asserting

9. After suing Cinemark, the DOJ commenced litigation, either by enforcement actions or *amicus curiae* appearances, against the other largest movie theater companies in the country. *See* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at 8-10 and 12-13 n.10, filed previously with the Court.

that all of its stadium-style movie theaters provided wheelchair-using patrons with unobstructed views of the movie screen from wheelchair seating located amidst or adjacent to seating for the general public, and therefore complied with Section 4.33.3 as a matter of law. The DOJ opposed Cinemark's motion, arguing that Cinemark failed to comply with the "viewing angle" requirement it "interpreted" from Section 4.33.3. Despite prior arguments that its interpretation did not rise to the level of "final agency action," the DOJ asserted that its interpretation should nevertheless be accorded deference.[10] On November 19, 2001, the district court issued a memorandum opinion in which it rejected the DOJ's interpretation, refused to defer to the DOJ, granted Cinemark's motion for summary judgment, and entered final judgment for Cinemark. *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11, 13 (N.D. Ohio Nov. 19, 2001).[11]

On January 24, 2002, the DOJ appealed the district court's ruling to the Sixth Circuit. The Sixth Circuit reversed the district court's decision, holding that certain parts of the DOJ's interpretation were entitled to deference, and remanded the case for further proceedings. *United States v. Cinemark*, 2003 WL 22508500, at *7, *11. In response to Cinemark's arguments that it was unfair to enforce the DOJ's "interpretation" of Section 4.33.3 retroactively in light of undisputed evidence that the DOJ encouraged Cinemark and others to rely on accessibility approvals granted under the agency's own state code certification program prior to announcing its "interpretation" of Section

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10. This time, however, the DOJ retreated from sponsoring a specific quantitative requirement, arguing instead that "lines of sight comparable" required stadium-style movie theaters to provide "viewing angles" for wheelchair seating within the range of viewing angles for most of the general public with respect to "distance to screen, obstruction of view, and distortion of images." App. 20a-21a.

11. The *United States v. Cinemark* district court opinion is discussed in Regal's Petition and a copy of the opinion is included in the appendix to Regal's Petition. *See* Regal Cinemas, Inc.'s Petition for a Writ of Certiorari, No. 03-641, at App. 49a-71a, filed previously with the Court.

4.33.3, the Sixth Circuit ordered the district court to strongly consider making any relief prospective only. *Id.* at *9, *10. Cinemark is presently considering whether to seek Supreme Court review of this decision.

REASONS FOR GRANTING REVIEW

To call the DOJ's modification of the ADAAG a mere "interpretation" is to perpetuate a particularly cynical fiction. To maintain the fiction, one would have to conclude that thousands of movie theater multiplexes across the country were built improperly. One would have to believe that independent architects and design professionals, working for every major movie theater company, repeatedly and severely misinterpreted the same law. One would have to pretend that a multitude of neutral governmental building and licensing inspectors in separate states, including inspectors working to enforce codes certified as meeting ADAAG requirements, each independently "got it wrong."[12] One would have to concede that an entire law-abiding industry simultaneously, pervasively, and consistently misapplied the same design requirement in the same disastrously mistaken way.

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12. The American Institute of Architects, a national organization representing 63,000 architects across the country, filed *amicus curiae* briefs in support of Cinemark in both the Fifth and Sixth Circuits. Relevant parts of the AIA *amicus* briefs are provided in Cinemark's appendix at App. 25a-38a. The AIA argued, in relevant part, that

> Here, the Texas Accessibility Standards ("TAS") were granted certification by the Attorney General in 1996, and Cinemark had been found to comply with that code. Both state and local officials had determined that the Tinseltown facility complied with TAS, and thus necessarily the ADA. . . . If the District Court's decision is affirmed, architects, builders, and building owners are left in the position of having no degree of certainty, and Congress's certification provision is rendered meaningless.

App. 29a.

The reality of *Stewmon* is that the DOJ is now permitted to modify building standards after the fact of construction and without public participation or due process. The public accommodation title of the ADA applies to virtually every major construction project in the United States. If this decision is permitted to stand, not one public facility is safe from post-construction second-guessing or ruinous retrofitting liabilities. As a result of this case, an entire industry is burdened with the obligation of making massive structural modifications. Even worse, no one — including the DOJ or the Ninth Circuit majority that deferred to the agency — has been able to provide adequate guidance to the movie theater industry on precisely what *is* required to build lawfully on a going-forward basis. Moreover, no one can credibly assert that design requirements will not abruptly change again should the DOJ decide to "reinterpret" its regulation again.

The Ninth Circuit's decision to accord controlling deference and retroactive effect to the government's casual and post-construction modification of design standards is both profound and insidious. It is no exaggeration to say that the nation sits on the precipice of a public accommodations construction nightmare. The lower courts require guidance on the level of deference, if any, that should be afforded to an agency's after-the-fact imposition of new design obligations, presented through litigation and without complying with the notice and comment strictures of the APA. Builders, owners, and operators of places of public accommodation require protection from high-handed agency overreaching. The public requires assurance that agencies may not take property and impose penalties without fair notice. Each of these issues is squarely presented in the Ninth Circuit's *Stewmon* decision and the recent Sixth Circuit opinion in *United States v. Cinemark*.

A. *United States v. Cinemark* Exacerbates The Pending Circuit Conflict And Provides Further Support For Accepting Review.

After Regal filed its petition on October 27, 2003, the Sixth Circuit issued its opinion in *United States v. Cinemark USA, Inc.* Perpetuating an unusual phenomenon in the case law addressing Section 4.33.3 of ADAAG, in which every decision made by a district court (regardless of which side prevails) is either reversed or vacated on appeal, the Sixth Circuit reversed the Northern District of Ohio's earlier decision to grant summary judgment in favor of Cinemark.[13] The resulting opinion creates even more confusion than previously existed. While it is clear that the Ninth Circuit and the Sixth Circuit disagree with the Fifth Circuit on what is required to provide "lines of sight comparable" under Section 4.33.3, it is equally clear that these courts do not fully agree with each other on any other issue. The result is a 1-1-1 circuit conflict on a specific issue of federal law interpretation, on the more general issue of deference to an agency's interpretation, and on the fair notice doctrine issue.

The Sixth Circuit concluded that Section 4.33.3 requires public accommodations to provide more than unobstructed views to be "comparable," and stated that "the criteria for evaluating similarity, while not explicit in the regulation, doubtless include viewing angle." *United States v. Cinemark*, 2003 WL 22508500, at *5. This holding directly conflicts with the Fifth Circuit's holding in *Lara*. *See Lara*, 207 F.3d at 789

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13. *See United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 19, *rev'd*, __ F.3d __, 2003 WL 22508500 (6th Cir. Nov. 6, 2003); *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002), *vacated*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003); *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (W.D. Tex. Aug. 21, 1998), *rev'd*, 207 F.3d 783 (5th Cir. 2000); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001), *rev'd*, 339 F.3d 1126 (9th Cir. 2003).

("we cannot conclude that the phrase 'lines of sight comparable' requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen"). However, unlike the Ninth Circuit, the Sixth Circuit did not find that the wheelchair seating locations at Cinemark's stadium-style movie theaters violated Section 4.33.3, and remanded to the district court the issue of "determining the extent to which lines of sight must be similar for wheelchair patrons" in the first instance. *United States v. Cinemark*, 2003 WL 22508500, at *8.

The circuits also conflict with respect to how they have applied the deference doctrines to the DOJ's litigating position. The Sixth Circuit stated that "[t]he DOJ's interpretation should be upheld unless it is 'plainly erroneous or inconsistent with the regulation,'" and then found that the DOJ's position that a "viewing angle" component should be considered when assessing comparability was "neither plainly erroneous nor inconsistent with the regulation." *Id.* at *7. The fact that the Sixth Circuit deferred to the DOJ's interpretation at all provides conflict with *Lara*, where the Fifth Circuit rejected the DOJ's "litigating position" completely. *See Lara*, 207 F.3d at 788 (court could not adopt DOJ's interpretation because "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3" and "additional language will be necessary to codify the DOJ's litigating position"). Unlike *Stewmon*, however, the Sixth Circuit deferred only to DOJ's core position that viewing angles must be considered, and declined to adopt the DOJ's interpretation to the extent that doing so would require a finding that Cinemark's wheelchair seating locations actually violated Section 4.33.3. *Compare United States v. Cinemark*, 2003 WL 22508500, at *8, *with Stewmon*, 339 F.3d at 1133.[14]

The conflict persists with respect to the fair notice issue. The Sixth Circuit concluded that "Cinemark's reliance on TAS

14. The analysis of both courts was flawed, however, by their mutual failure to inquire, as a threshold matter, whether the DOJ's position was genuinely interpretative. *See* Section B of this Brief, *infra*.

and the government's statements with respect to the state building code certification process weigh strongly in favor of making any relief that the district court grants the government apply only on a prospective basis." *United States v. Cinemark*, 2003 WL 22508500, at *9. This conflicts with the apparent assumption by the *Stewmon* majority that relief should be retroactive. *See Stewmon*, 339 F.3d at 1132 (ordering district court to grant summary judgment for plaintiffs), 1134 (discussing effects of retroactive application of the majority's ruling) (Kleinfeld, J., dissenting).

The holdings in these cases cannot be reconciled. Analyzing *Lara*, *Stewmon*, and *United States v. Cinemark* reconfirms Judge Andrew Kleinfeld's observation that builders of public accommodations have been put "in a position of impossible uncertainty as to what they must do to comply with the law." *Stewmon*, 339 F.3d at 1133 (Kleinfeld, J., dissenting).

B. The Court Should Grant Review To Clarify Its Position On Deferring To Informal Agency "Interpretations" Of Regulations.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court announced a doctrine that generally provides for judicial deference to *reasonable* agency interpretations of *ambiguous* statutes. In the cases of *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead*, 533 U.S. 218 (2001), the Court elaborated on and refined this doctrine. The essence of *Mead* and *Christensen* is that *Chevron*-style deference applies only to agency interpretations that result from formal adjudication, notice-and-comment rulemaking, or some other method by which Congress intended to grant comparable law-making authority and which evidences the considered judgment of the agency.[15] While

15. Where *Chevron* does not apply, the agency's interpretation is reviewed *de novo* and is entitled only to "weight" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the amount of which depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 164.

Christensen and *Mead* curb agency abuse inherent in overly aggressive *statutory* interpretation, these cases do not expressly speak to the possibility of similar agency misconduct disguised as interpretation of an agency's own regulations. This Court should provide guidance on the limitation of judicial deference to informal agency pronouncements (including litigating positions) about agency *regulations*, particularly when such pronouncements effectively amend or add substance to the regulations.

The confusion in the lower courts is manifest, as illustrated in the present circuit conflict. The Ninth Circuit in *Stewmon* and the Sixth Circuit in *United States v. Cinemark* each purport to rely on Supreme Court case law to support ceding *controlling* deference to the DOJ's litigation position. The Ninth Circuit cites *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and the Sixth Circuit cites *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), along with *Auer*, both of which derive in large part from the pre-APA case of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), where the Court stated that an "administrative interpretation . . . becomes of controlling weight unless it is *plainly erroneous or inconsistent* with the regulation."[16] As demonstrated in the present case, uncritical adherence to the *Seminole Rock* standard of deference imbues even lower level agency officials with virtually unlimited power to modify and create law. Furthermore, agencies are actually encouraged to develop vague regulations, thereby preserving maximum bureaucratic "flexibility." The Ninth and Sixth Circuits apparently read *Auer* and *Seminole Rock* to require absolute acceptance of agency pronouncements with little or no regard for transparency of decision-making process, consistency of

16. Dicta in *Christensen* explains that "*Auer* deference is warranted only when the language of the regulation is ambiguous" adds some confusion to the proper deference analysis, but in no way excuses a threshold inquiry of whether or not the informal agency position is truly interpretative in the first place. *See Christensen*, 529 U.S. at 588. Where the agency position is not truly derivative of the regulation, it should not be accorded *Auer*-type deference.

agency position, whether the agency considered all relevant factors, or impact on a regulated public. Here, the Ninth and Sixth Circuits do not even inquire as to whether the agency's position is genuinely "interpretative." Thus, by merely *claiming* to interpret a regulation, the agency is accorded the practical opportunity to manufacture wholly new substantive requirements (or even change course on existing requirements) without having to articulate its reasoning, hear opposing views from the public, or incur the burden of meaningful judicial review.[17]

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17. The threshold issue of whether the agency's pronouncement is truly interpretative is thus critically important. The primary justification for the "interpretation" exception to notice and comment under the APA derives from the assumption that, by simply "interpreting," the agency is not making new law, but is merely explaining content already inherent in the regulation. This assumption is invalid when the agency finesses "interpretations" to create new obligations. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 Admin. L. Rev. 547 (2000); Robert A. Anthony, *Interpretive Rules, Legislative Rules and Spurious Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1 (1994). It is vitally important that the Court police agencies with respect to this type of conduct. Deference ought not be accorded to informal agency action that is not genuinely interpretative. Authentic interpretation in this sense was described by Professor Anthony:

> To interpret is to derive a proposition from existing law whose meaning compels or logically justifies the interpretation. To be susceptible to interpretation, the existing law must have some tangible meaning (rather than empty or vague language like 'fair and equitable' or 'just and reasonable') that can be interpreted. There must be a logical connection between the substantive content of the existing statue (or legislative rule) and the substantive content of the document that purport to interpret it, such that the latter flows fairly from the former.

Robert A. Anthony, *Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty Policy Analysis*, Policy Analysis, August 11, 1991, at n.15, available at http://*www.cato.org/pubs/pas/pa-312.html*.

The rote reading of *Seminole Rock* and *Auer* advocated by the DOJ and adopted by the Ninth Circuit does not even impose the low threshold standard of reasonableness (required of statutory interpretation in *Chevron*), no matter how informal (or disingenuous) an agency's purported "interpretation." Instead, the Ninth Circuit merely inquires whether the interpretation is "*plainly erroneous or inconsistent*" with the regulation. Thus, and paradoxically, it is more difficult to overturn informal (even low-level) agency pronouncements, so long as they purport to be interpretations of regulations (such as the *amicus curiae* interpretation in this case), than it is to overturn a regulation adopted with notice and comment in accordance with the APA.[18]

This Court should resolve the circuit conflict on the level of deference accorded an informal agency pronouncement under the circumstances here. *Lara v. Cinemark USA, Inc.* conflicts with the reasoning of the Ninth and Sixth Circuits. Additional Fifth Circuit authority, as well as cases in the Third, Seventh, and D.C. Circuits, also conflict with the rationale of the Ninth and Sixth Circuits. *See, e.g., Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (litigating positions may not reflect fair and considered judgment of agency); *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999) (rejecting interpretation as not derivative of regulation); *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (legal brief not entitled to deference); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998);

18. The combined effect of intentionally ambiguous regulations and an agency's opportunistic assertion of deference under *Seminole Rock* is also inconsistent with section 706 of the APA, which states that "the reviewing court shall determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2000). Taken to extreme, overly generous judicial deference also leads inevitably to a practical constitutional separation of powers issue by uniting lawmaking and law-exposition in the same agency hands. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 631, 638-54 (1996).

National Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997); *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996) (declining to defer to purported interpretation).

C. This Court Should Grant Review To Reinforce The Viability Of The Fair Notice Doctrine.

Cinemark's experiences with the DOJ exemplify the costly effects of agency overreaching. At no time prior to July 1998 did the DOJ take any action that put Cinemark or others on notice of an "interpretation" that Section 4.33.3 of ADAAG mandated compliance with a quantitative "viewing angle" requirement. Concerning Section 4.33.3, the DOJ first maintained silence, later admitted that it had not yet taken a position on the issues, and then abruptly announced via *amicus curiae* brief filed in *Lara v. Cinemark* the existence of a "viewing angles" requirement "interpreted" from the phrase "lines of sight comparable" in Section 4.33.3. The DOJ variously refers to the rule first announced in its *Lara amicus* brief, and later restated and broadened in enforcement actions against Cinemark and others, as a mere "interpretation" or "litigating position." No matter what terminology is used, by claiming insulation from public or judicial review for its informal pronouncements on one hand, but on the other hand asserting entitlement to *Seminole Rock* or *Auer* deference in the courts, the DOJ has engaged in illegal rulemaking. It has effectively established a new construction standard, imposed new obligations, and departed from all prior articulations of Section 4.33.3 in small venues. Under the pretext of advancing an "interpretation," the DOJ has consciously and callously sidestepped Congressionally mandated rule-making procedures, as well as judicial review, intruding into province of both legislature and judiciary.

It is uncontested that the DOJ's new "viewing angle" standard or rule was adopted without notice of any kind whatsoever. It was not until Cinemark had designed, built, obtained pre- and post-construction approvals, and opened scores of stadium-style movie theaters for business that it first received notice that the DOJ intended to "interpret" Section 4.33.3 differently to stadium theater construction as compared to other small areas of "public

assembly," including traditional sloped-floor movie theaters. Moreover, the DOJ factors leading to the adoption of the new rule, valid or invalid, well-reasoned or not, remain unknown to Cinemark because the DOJ has repeatedly maintained that it did not engage in "final agency action" to avoid judicial review of its purported interpretation, and blocked all attempts to secure discovery concerning its pronouncements on Section 4.33.3. Thus, the DOJ not only asserts the right to unilaterally impose new building standards in the guise of an "interpretation," but also claims the privilege of forever shielding from public scrutiny the "facts" considered, the reasoning applied, and the process utilized in setting that new standard.

The resulting damage to Cinemark and the movie theater industry offends all notices of due process and justice. Stadium-style movie theater multiplexes that were designed and constructed in meticulous compliance with the plain language of applicable federal and state accessibility regulations (Section 4.33.3 of ADAAG and its state counterparts), as well as then-accepted industry interpretations and the DOJ's prior pronouncements on the regulation, before the DOJ's new rule was announced, are now deemed "inaccessible" and subject to ruinous retrofitting costs. Moreover, the DOJ's willful propagation of the fiction that Section 4.33.3 has "always required" what the agency currently espouses unfairly paints Cinemark and all others who have built public facilities in reliance on the prior standards as scofflaws. The DOJ's posturing also makes these companies inappropriately vulnerable to ADA lawsuits by both private individuals who are encouraged, with or without DOJ's *amicus* participation, to assert the DOJ "expert" interpretation to the courts.[19]

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19. In addition, the initial district court holding in *Lara v. Cinemark*, later reversed on appeal, generated opportunistic "copycat" lawsuits against Cinemark, including *Wittie v. Cinemark USA, Inc.*, No. A-98-CA-40JN (W.D. Tex. 1998); *Vander Hee v. Cinemark USA, Inc.*, No. M-98-230 (S.D. Tex. 1998); *Drey v. Cinemark USA, Inc.*, No. H-98-2021 (S.D. Tex. 1998); *Freeland v. Cinemark USA, Inc.*, No. 1:98CV1976 (E.D. Tex. 1998); and *Wittie v. Cinemark USA, Inc.*, No. GN102313 (Travis County, Texas Feb. 27, 2003). All of these lawsuits were ultimately decided in favor of Cinemark, the last by jury verdict.

Even buildings constructed in reliance on advance state and local agency approvals, obtained under a statutory certification program developed and endorsed by the DOJ itself for the express purpose of providing builders with pre-construction assurances of compliance with the ADA are now labeled illegal by that same government agency, with the result that private individuals are being encouraged to sue Cinemark and others.

CONCLUSION

Under the guise of "interpretation," and by consciously manipulating judicial deference doctrines, the DOJ has overstepped its proper province. The agency has "*defacto* created" a legislative rule, unfettered by public participation, virtually unaccountable to the courts, and without regard to the rulemaking procedures required by Congress.

For the foregoing reasons, Cinemark USA, Inc. respectfully submits that the Court should grant Regal Cinemas, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

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